In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1858

MON VALLEY TERMINAL, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioners are the owner and lessee of a wharf on the Monongahela River in Washington County, Pennsylvania. The United States, as an improvement to navigation, built a dam which raised the level of the river to its ordinary high water mark. This apparently dimininished the usefulness of petitioners' wharf by making ships ride higher above the wharf than they otherwise would have except in high water (Pet. 4-6; Pet. App. 15).

Petitioners brought actions under the Tucker Act, 28 U.S.C. 1346(a)(2), and the Declaration of Taking Act, 40 U.S.C. 258a, to secure just compensation for the partial loss of use of the wharf. The district court held that the petitioners were not entitled to compensation from the United States because the power

to regulate navigation under the Commerce Clause of the Constitution confers upon the United States a dominant servitude which extends to the entire stream and its bed below the ordinary high water mark and because petitioners held the wharf under permits granting them no property rights and expressly excluding liability of the United States for damages incurred as a result of improvements to navigation (Pet. App. 15-19). The court of appeals affirmed (Pet. App. 14).

The decisions below are correct and require no further review.

1. Petitioners maintained the wharf by virtue of a revocable permit issued by the Corps of Engineers under 33 U.S.C. 403. The permit provides:

> It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges * * *.
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> * * * * *
>
> That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage. [Pet. App. 16-17.]

Under the terms of the permit, petitioners acquired no property rights, nor any right to compensation from the United States for loss of use of the wharf caused by the improvement of navigation. Under simple contract law petitioners are barred from any recovery. See also *United States* v. *Fuller*, 409 U.S. 488.

2. In *United States* v. *Rands*, 389 U.S. 121, this Court held (at 122-123):

> The Commerce Clause confers a unique position upon the Government in connection with navigable waters. "The power to regulate commerce comprehends the control for that purpose, amd to the extent necessary, of all the navigable waters of the United States * * *. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia*, 3 Wall. 713, 724-725 (1866). This power to regulate navigation confers upon the United States a "dominant servitude", *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-597 (1941); *Gibson* v. *United States*, 166 U.S. 269, 275-276 (1897). Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, *South Carolina* v. *Georgia*, 93 U.S. 4 (1876), or otherwise impair or destroy a riparian owner's access to navigable waters, *Gibson* v. *United States*, 166 U.S. 269 (1897); *Scranton* v. *Wheeler*, 179 U.S. 141 (1900); *United States* v. *Commodore Park, Inc.*, *States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945), even though the market value of the riparian owner's land is substantially diminished.

The courts below thus correctly concluded that, because of the servitude in favor of the United States, petitioners have no right of recovery for the lessened usefulness of their wharf caused by the raising of the water level of the river to improve navigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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